Nos. 82-1186, 82-1465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

—v.—

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED,
Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF TRANS WORLD AIRLINES, INC.
Petitioner in No. 82-1186 and Respondent in No. 82-1465

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PRELIMINARY STATEMENT

Trans World Airlines, Inc. ("TWA"),[1] petitioner in No. 82-1186 and respondent in No. 82-1465, respectfully submits this Reply Brief in response to the brief of Franklin Mint

[1] In compliance with Rule 28.1 of this Court, TWA states that as of the date hereof 81.34 percent of its common shares are owned by Trans World Corporation and 18.66 percent of its shares are publicly held.

Corporation, Franklin Mint Limited and McGregor, Swire Air Services Limited (collectively "Franklin Mint"). TWA also responds herein to the arguments of *amici curiae*, Boehringer Mannheim Diagnostics, Inc. ("Boehringer") and Mark Hammerschlag and Ellen van Fleet (collectively "Hammerschlag"), to the extent that they raise issues not covered by Franklin Mint.

ARGUMENT

POINT I

CONSTITUTIONAL CONSIDERATIONS MANDATE THAT THE WARSAW CONVENTION'S LIMITATION OF LIABILITY PROVISIONS CONTINUE TO BE ENFORCED BY THE JUDICIARY

As TWA demonstrated in its Main Brief, it is clearly beyond the province of the judiciary to abrogate treaties, that power having been constitutionally lodged in the political branches of the Government. (TWA Main Brief at 15-16). Therefore, since neither Franklin Mint nor its *amici* supporters have been able to point to an act of Congress specifically declaring the Warsaw limitation provisions unenforceable, and since the executive branch is presently before this Court urging that those provisions be enforced, there is absolutely no basis for sustaining the Second Circuit's declaration that the Warsaw limitation provisions are prospectively unenforceable in the United States. Predictably, Franklin Mint and its *amici* supporters disagree.

In an effort to support that disagreement Franklin Mint and its *amici* offer essentially three arguments: (i) that by repealing the Par Value Modification Act, which set the official price for gold in the United States, Congress effectively abrogated the Warsaw limitation provisions; (ii) that the doctrine of *rebus sic stantibus*, unmentioned by the Second Circuit, supports nullification of the treaty provisions in question; and (iii) that a variety of policy considerations, all of which boil down to the

contention that the existing Warsaw limits of liability are too low, should lead this Court to set those limits aside.

As will be demonstrated below, all of Franklin Mint's and the *amici*'s contentions are totally without merit.

The Repeal of the Par Value Modification Act Had No Effect Upon the Warsaw Limitation Provisions—The Last Official Price of Gold Continues to Be Used for a Variety of International Purposes

In an effort to support their contention that congressional repeal of the Par Value Modification Act was tantamount to a legislative abrogation of the Convention's limitation provisions, Franklin Mint and the *amici* recite various rules of law which, while undoubtedly correct, simply do not lead to the result they seek. Thus, they note that courts have both the authority and the responsibility to interpret treaties (*e.g., Cook v. United States,* 288 U.S. 102 (1933)); that an act of Congress may supersede a prior treaty (*e.g., The Cherokee Tobacco,* 78 U.S. (11 Wall.) 616 (1871)); and that a treaty is the equivalent of an act of legislation (*e.g., Reid v. Covert,* 354 U.S. 1 (1957)). However, Franklin Mint and its *amici* totally ignore the equally well settled rule that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States,* 288 U.S. at 120. *See also* cases cited in TWA's Main Brief at 16. Since the repeal of the Par Value Modification Act makes absolutely no reference to the Warsaw Convention, under the rule in *Cook* it simply cannot be found to have abrogated the Convention's limitation of liability provisions.

Amicus Hammerschlag attempts to overcome the *Cook* infirmity by relying upon *Reid v. Covert,* 354 U.S. at 18 n.34, and *Whitney v. Robertson,* 124 U.S. 190 (1888), which held that if a treaty and a statute are inconsistent, "the one last in date will control the other." 124 U.S. at 194. However, Hammerschlag fails to deal with the fact that use of the last official price of gold as the conversion factor is not inconsistent with

the repeal of the Par Value Modification Act. The history of the legislation repealing that act clearly indicates that Congress contemplated the continued use of the last official price of gold. Senate Comm. on Foreign Relations, Bretton Woods Agreements Act (the "Repeal Act"), S. Rep. No. 1148, 94th Cong., 2d Sess. 12-13 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935, 5947.[2]

Moreover, Hammerschlag's contention that the various present uses for the last official price of gold have no practical transactional significance is simply wrong. (Hammerschlag Brief at 12). Similar to the Warsaw limitation provisions, the Articles of Agreement of the International Bank for Reconstruction and Development (the "World Bank"), the Inter-American Development Bank and the Asian Development Bank employ a specified weight and fineness of gold as the unit of account for payment of subscription obligations. However, they use the United States gold dollar rather than the Poincare gold franc as a shorthand for the weight and fineness of the gold in question. Significantly, the United States pays its obligations to those organizations by converting the gold provisions of their Articles of Agreement into present United States dollars based upon the last official price of gold. For example, payments employing the last official price of gold as a conversion factor were made to the World Bank on December 22, 1978, May 22, 1980, January 19, 1981, February 24,

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2 In addition, even if it were possible to conclude that the repeal of the Par Value Modification Act might be read to be inconsistent with the continued use of the last official price of gold as the conversion factor, Hammerschlag's argument could not prevail. As equally well-settled as the rule in *Reid v. Covert* is the rule that two statutes (or a treaty and a statute) which may be construed both consistently and inconsistently *must* be construed in such a manner as to give effect to both. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Therefore, since the repeal of the Par Value Modification Act may clearly be construed to be consistent with the continued use of the last official price of gold as the Warsaw conversion factor, Hammerschlag's reliance upon *Reid v. Covert* is misplaced.

1982, and December 1, 1982.[3] (*See* TWA Main Brief at 17-18; United States Brief at 24-25).

In short, the rule in *Cook v. United States* requires specific and unambiguous legislative intent to abrogate a treaty. When that rule is considered together with the legislative history of the repeal of the Par Value Modification Act (which makes no mention of the Warsaw Convention[4] and contemplates the *continued use* of the last official price of gold as an international unit of account) and the fact that the United States *continues* to use the last official price of gold as an international conversion factor, it can hardly be contended that the repeal in any way affected the Warsaw limitation provisions.

Rebus Sic Stantibus

Without citing a single case in direct support of their position, Franklin Mint and Hammerschlag argue that the doctrine of *rebus sic stantibus* may be employed in order to set aside the Warsaw limitation provisions. (Franklin Mint Brief at 40; Hammerschlag Brief at 14-15). Thus, they contend that there is an accepted rule of international law which provides that "a treaty need not be followed where there has been a substantial change in conditions since the promulgation of the treaty." (Franklin Mint Brief at 40). That argument is flawed in three respects: (i) the doctrine is at best a questionable rule of international law; (ii) the United States Government has pub-

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3 Counsel for TWA has been advised of the above-mentioned payments, and the dates thereof, by the United States. The source of this information is Russell L. Munk, Esquire, Assistant General Counsel for International Affairs, Department of the Treasury.

4 The failure of the legislative history to make reference to the Warsaw Convention is not surprising. As TWA demonstrated in its Main Brief, the Warsaw Convention is a self-executing treaty which required no enabling legislation (TWA Main Brief at 19; *see also* United States Brief at 16). Therefore, despite Hammerschlag's protestations to the contrary (Hammerschlag Brief at 18 n.24), the Par Value Modification Act was never directly tied to the effectiveness of the Warsaw Convention.

licly questioned the existence of the doctrine as a clearly defined concept; and (iii) in any event, use of the doctrine is limited to the executive branch of the Government.

Despite Franklin Mint's and Hammerschlag's arguments, "the existence of [the *rebus sic stantibus*] doctrine as a rule of international law has scarcely been established." Briggs, *The Attorney General Invokes Rebus Sic Stantibus*, 36 Am. J. Int'l L. 89, 90 (1942). Indeed, it has been questioned by the United States at meetings of the International Law Commission.[5]

In addition, to the extent that the doctrine of *rebus sic stantibus* may be invoked at all, it may be invoked only by the executive. *See Hooper v. United States*, 22 Ct. Cl. 408 (1887), in which the court took pains to clarify that it is not the judiciary but the executive which is empowered to annul a treaty. Indeed, section 153 of the Restatement (Second) of Foreign Relations Law of the United States (1965), the only authority upon which Franklin Mint bases its *rebus sic stantibus* argument, makes clear that the application of the doctrine is solely an executive prerogative.

Comment c to section 153 of the Restatement provides:

> *Requirements applying to party invoking doctrine.* The principle of *rebus sic stantibus* does not give a party a right unilaterally to free itself from the obligations of an agreement by acting in a manner inconsistent with its purposes. A party believing that a change which has occurred is of such importance that it may suspend or terminate its obligations must, in the first instance, show its good faith by seeking the concurrence of the other

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5 Thus, the United States has stated:

> The concept of *rebus sic stantibus* embodied in the present article appears to the United States Government to have long been recognized to be of so controversial a character and so liable to the abuse of subjective interpretation that it has reservations about the incorporation of the concept in the draft articles, at any rate in its present form. (Fifth Report on the Law of Treaties, [1966] 2 Y.B. Int'l L. Comm'n 1, 40, U.N. Doc. A/CN.4/183/SER.A/1966/& Add.1-4).

party or parties, unless the circumstances make this impossible or obviously futile.

Since a party seeking to be relieved of its obligation pursuant to the doctrine must first seek the concurrence of the other parties to the treaty and since there is no doubt that, at least in terms of the United States Government, the only branch which deals directly with foreign governments is the executive, only that branch may invoke the doctrine.[6]

Franklin Mint's and the *Amici*'s Policy Arguments

The remainder of Franklin Mint's and the *amici*'s arguments relating to the unenforceability of the Warsaw limitation provisions are based upon a series of "policy" contentions. Included among those arguments are the claim that the Warsaw Convention is "an anachronism" since among the reasons for its passage was the encouragement and protection of the infant

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6 Significantly, the sole United States authority which appears to be unequivocally in favor of the doctrine of *rebus sic stantibus* relates to an executive act. That authority is the opinion of then Acting Attorney General Francis Biddle concerning President Roosevelt's suspension of the International Load Line Convention of 1930 during World War II. Quite apart from the special circumstances attendant to that opinion arising from a global conflict, which are obviously not applicable here, even Attorney General Biddle noted that ordinarily a state which relies upon the principle of *rebus sic stantibus* should request agreement of other parties to the treaty. 40 Op. Att'y Gen. 119, 123 (1941). Thus, he was necessarily of the view that the doctrine of *rebus sic stantibus* can only be relied upon by the executive. *See also* Statement by Secretary of State Acheson, 25 Dep't St. Bull. 647 (1951) (released to the press Oct. 10, 1951), in connection with negotiations for a revision of the Anglo-Egyptian Treaty of 1936:

> The U.S. Government believes that proper respect for international obligations requires that they be altered by mutual agreement rather than by unilateral action of one of the parties.

Indeed, Article 39(2) of the Warsaw Convention itself specifically requires a signatory desiring to withdraw from the Convention to give its treaty partners six months' notice. Obviously, no such notice was given here.

aviation industry (Franklin Mint Brief at 8-12; Hammerschlag Brief at 23-24); the claim that the United States has sought to secure higher recoveries for airline passengers (Franklin Mint Brief at 13-15; Hammerschlag Brief at 23-25); and the claim that, as a result of the foregoing contentions, the Convention's limitation of liability provisions are too low and therefore unfair to air passengers and the shippers of air freight.[7]

Although Franklin Mint and the *amici* rely heavily upon such "policy" arguments, it is submitted that they are totally irrelevant. Such contentions improperly invite the Court to determine whether to abrogate the limitation provisions of the

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7 As demonstrated in the accompanying text, the issue of whether the limits are too low is totally irrelevant to the issue of whether those limits must be judicially enforced. Nevertheless, it should be noted that Franklin Mint's and the *amici*'s contentions concerning the adequacy of the Convention's limits are open to substantial question.

With respect to cargo, the limit, based upon the last official price of gold, is $20 per kilogram, or $9.07 per pound. That limit is equal to or higher than the limits of liability for cargo shipped by domestic air transport, which is not governed by the Warsaw Convention. In fact, liability for domestic cargo is often as low as $0.50 per pound or about $1.10 per kilogram. (Affidavit of William H. Clarke, Director-Cargo Planning for TWA (set forth in the Joint Appendix submitted to the Court of Appeals at A305)). Moreover, the Montreal Protocols provide for a limit of liability for lost or damaged cargo of 17 SDRs, or approximately $20, per kilogram.

The Warsaw limit of liability for death and personal injury is actually set by the Montreal Agreement of 1966, not Article 22 of the Warsaw Convention. That Agreement provides for absolute liability for damages up to $75,000, which amount is expressed not in terms of gold but in terms of United States dollars. The Montreal Protocols, considered by the Senate last year, also provide for absolute liability for death and personal injury and would increase the limit to approximately $317,000 ($100,000 in SDRs plus $200,000 from a supplemental compensation plan). In addition, the Senate is presently considering a supplemental compensation plan which, while leaving absolute liability for death and personal injury in place, would permit full recovery of economic damages for such injuries without limitation. *See* Letter from Paul R. Ignatius, President of the Air Transport Association of America, to Secretary of State George P. Schultz (Sept. 22, 1983).

treaty based upon its own views of appropriate policy, as if the Warsaw limits were judge-made common law rather than a treaty obligation of the United States. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). As this Court only recently observed in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981):

> [T]he federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is "subject to the paramount authority of Congress." *New Jersey v. New York*, 283 U.S. 336, 348.[34]
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> [34] . . . [T]he task of the federal courts is to interpret and apply statutory law, not to create common law. (Citations omitted).

Thus, it has long been settled law that this Court does "not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Since this Court is " 'not concerned . . . with the wisdom, need, or appropriateness of the legislation' "[8] [*Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (quoting *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 246 (1941))], it can hardly be concerned with whether it agrees with the levels of liability set by the Convention's signatories.

In view of the foregoing, Hammerschlag's complaint that the United States' *amicus* brief, supporting the use of the last official price of gold as the Warsaw conversion factor, is a change from prior positions taken by the United States Government is clearly misplaced. There is no inconsistency between the political branches' various attempts to raise the Warsaw

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8 As Franklin Mint and its *amici* have pointed out, for purposes of judicial interpretation, the rules which apply to domestic legislation are equally applicable to treaties. *See, e. g., Reid v. Covert*, 354 U.S. 1 (1957), relied upon in the Hammerschlag Brief at 9.

limits for death and injury (but not cargo) via the appropriate route of international conventions and diplomacy (described in the Franklin Mint Brief at 13-15) and the Government's *amicus* position before this Court—that the judicial branch must enforce the Convention, a valid and binding treaty, as it presently exists.

In sum, this Court's primary duty with respect to treaties is to ensure that the United States fulfills the international obligations which the political branches have undertaken. Whether it is in the best interests of the United States to adhere to a treaty which provides for limited, but certain, recovery for "victims of air crashes" (a question raised in the Hammerschlag Brief at 13) is a decision to be made by the political branches of the Government, not by this Court. To hold otherwise would not only violate the separation of powers doctrine embedded in the Constitution but would also, as a practical matter, severely hamstring the political branches in their efforts to carry out their delicate foreign policy duties. (*See* United States Brief at 2-3).

POINT II

THE FREE MARKET PRICE OF GOLD IS AN INAPPROPRIATE CONVERSION FACTOR FOR THE WARSAW LIMITATION PROVISIONS—THE MOST APPROPRIATE CONVERSION FACTOR IS THE LAST OFFICIAL PRICE OF GOLD

Franklin Mint and its *amici* contend that the use of the free market price of gold as the Warsaw unit of conversion is supported by three factors: (i) the text of the treaty; (ii) the prior practice in this country; and (iii) the intentions of the Convention's drafters. As demonstrated below, these factors simply do not lead to the conclusion which Franklin Mint suggests. To the contrary, when they are considered together with the canons of treaty construction, it becomes clear that the last official price of gold is the most appropriate unit of conversion.

The Text of the Treaty Does Not Support Use of Market Price

Franklin Mint's contention that a literal reading of the Convention supports its position begs the question before the Court. There is no doubt that the treaty provides for the use of gold; the question presently at bar is what gold value should be employed. Therefore, a simple reading of the treaty, literal or otherwise, does nothing to further elucidate the issue.

In fact, the language of the Convention clearly supports the use of the last official price of gold. Thus, in *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3264 (U.S. Oct. 3, 1983)(No. 83-5)(the "*Polish Case*"), the court specifically relied upon the "references to gold in the Convention" in support of its conclusion that the last official price of gold is the appropriate conversion factor. 535 F. Supp. at 843.

Indeed, as Franklin Mint's own authorities demonstrate, the last official price of gold is the appropriate conversion factor. The decision of the Permanent Court of International Justice (the "PCIJ") in *Serbian Loans*, 1929 P.C.I.J., ser. A, Nos. 20/21, *reprinted in* 2 World Ct. Rep. 344 (M. Hudson ed. 1935), *discussed in* G. Hackworth, 5 Dig. Int'l L. 630-35 (1943), to which Franklin Mint refers (Franklin Mint Brief at 20), underscores the fact that the drafters intended the gold value provisions to be read as referring to a stable unit of account, not to a precious metal. That case, decided in the year Warsaw was signed, involved the interpretation of various international loan agreements providing for payment based upon the gold franc. In construing those agreements, the PCIJ held: "It is manifest that the Parties, in providing for gold payments, were referring, not to payment in gold coins, but to gold as standard of value." *Serbian Loans*, 2 World Ct. Rep. at 365.

Practice in This Country Supports the Use of the Last Official Price of Gold as the Conversion Factor

Franklin Mint's arguments concerning the prior "practice in this country" are also wide of the mark. (Franklin Mint Brief at 21 *et seq.*). All that Franklin Mint's arguments under this rubric really suggest is that since ratifying the Convention it has been the practice in the United States to convert the Warsaw gold provisions according to the official price of gold and that since the United States' adherence to the Convention the official price of gold has risen from $35.00 to $42.22 per troy ounce. Franklin Mint then argues that this slight upward rise in the official price of gold provided a flexibility in the unit of conversion which would be lost if the limit is set at the last official price of gold, $42.22 per troy ounce.

The answer to Franklin Mint's "prior practice argument" is simple. It is TWA which urges continuation of the long-established practice in this country of employing the official price of gold as the Warsaw conversion factor; it is Franklin Mint which seeks to depart from prior practice in the United States. The response to Franklin Mint's flexibility contention is equally clear. The use of market price would not result in flexibility—it would result in chaos. Moreover, the "flexibility" to which Franklin Mint refers arose out of legislative acts which, from time to time, fixed the official price of gold. If the last official price of gold is employed as the conversion factor, it would in no way preclude future legislative acts, such as ratification of the Montreal Protocols or such future protocols as may be agreed upon by the signatories, from supplying the flexibility which Franklin Mint asserts is so desirable.

The Intent of the Drafters Also Leads to the Use of the Last Official Price of Gold

Franklin Mint's final argument in support of the use of the free market price of gold turns upon the claim that it was "the intention of the Convention's drafters to 'protect against inflation by linking the limits to the real value of gold.' " (Franklin Mint Brief at 24-25). The difficulty with this argu-

ment is that the use of the free market price of gold would, in fact, substantially undercut the primary purpose of the Convention's drafters—to set stable and predictable limits of liability.[9] As the court observed in the *Polish Case*:

> The signatories of the treaties looked to gold to avoid fluctuations in the limitations, since gold had a constant value and the currencies of the various nations were subject to unilateral alterations for reasons wholly unrelated to air carriers' liability. This constancy and stability, upon which the parties to the treaties relied, cannot be achieved if the fair market value of gold is used for the calculations. To substitute the fluctuating price of the commodity gold for the relatively fixed and certain price of an international monetary unit does, as defendant suggests, directly contravene the intentions of all those who adopted the treaties. For this reason, such a substitution is clearly inappropriate, and plaintiffs' suggestion that the fair market value of gold be the basis for the conversion must be rejected. (*Polish Case*, 535 F. Supp. at 842-43 (footnote omitted)).

Moreover, Franklin Mint's suggestion that use of the market price of gold would result in a conversion factor tied to inflation is simply wrong. At present, the market price of gold is not an economic indicator at all but only "a volatile commodity, not related to a price index, or to the rate of inflation." A. Lowenfeld, *Aviation Law* § 6.51, at 7-169 (2d ed. 1981).

In sum, the overriding purpose of Article 22 was to provide stable and predictable limits of liability—a purpose which would be totally thwarted by the use of the market price of gold.

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9 The use of the free market price of gold would create such unstable limits of liability that, as even *amicus* Boehringer admits, an extraordinarily sophisticated computer arrangement would be necessary to determine, at any given moment, just what the limits are. (Boehringer Brief at 16-17). The wild fluctuations of the market price of gold are illustrated by the graph at JA29.

Franklin Mint Has Failed to Respond to TWA's Demonstration That the Last Official Price of Gold Is the Most Appropriate Conversion Factor

Franklin Mint offers two arguments against the use of the last official price of gold—that use of the last official price will result in a limit which is "forever fixed" (Franklin Mint Brief at 29) and that Civil Aeronautics Board (the "CAB") Order 74-1-16 has been sapped of its vitality (Franklin Mint Brief at 33). Both of these contentions are clearly wrong.

The flaws in Franklin Mint's claim that use of the last official price of gold would result in limits which are "forever fixed" have already been demonstrated. (*See supra* p. 12). In short, whatever flexibility existed in the past was a result of legislative acts; use of the last official price of gold as the conversion factor would in no way preclude future legislative action with respect to the Warsaw unit of account.

Franklin Mint's attack upon CAB Order 74-1-16 is equally ineffective. Although Franklin Mint argues that the CAB itself no longer considers Order 74-1-16 as existing policy (Franklin Mint Brief at 33), the fact remains that the CAB has effectively endorsed the continued use of the last official price of gold as the unit of conversion. This is so because all United States air carriers are required to file their international tariffs with the CAB (*see* Federal Aviation Act of 1958, § 403(a), 49 U.S.C. § 1373(a) (1976)), and they have continued to file using the last official price of gold. Since the CAB has ordered this procedure, has not modified that Order and has not objected to such filings, it in fact continues to endorse the last official price of gold as the medium of conversion. Indeed, the Code of Federal Regulations presently *requires* international air carriers to inform passengers and shippers of the Warsaw limits in terms of United States currency based upon the last official price of gold as the conversion factor. 14 C.F.R. § 221.176 (1983).

Finally, Franklin Mint's suggestion that CAB Order 81-3-143 somehow undercuts the continued vitality of Order 74-1-16 is simply incorrect. (Franklin Mint Brief at 33). Order 81-3-143 (Application of British Caledonian Airways Limited (adopted

March 24, 1981)(set forth in the Joint Appendix submitted to the Court of Appeals at A121)) is a declaratory order ruling upon a single filing by a single airline—it does not purport to affect Order 74-1-16. In fact, its only effect was to permit a British air carrier to file its tariff in terms of SDRs, consistent with British legislation.[10]

In sum, for the reasons set forth in TWA's Main Brief, the last official price of gold is the most appropriate conversion factor for the Warsaw limitation of liability provisions. Unlike the market price of gold, it is totally consistent with the objectives and purposes of the Convention's drafters.

POINT III

SPECIAL DRAWING RIGHTS ARE AN ALTERNATIVE CONVERSION FACTOR

In its Main Brief, TWA demonstrated that SDRs are an appropriate alternative conversion factor for the Warsaw Convention's limitation provisions. (TWA Main Brief at 30-37). In the face of that demonstration, Franklin Mint and its *amici* supporters contend that SDRs are inappropriate for four reasons: (i) that SDRs would offend the text of the Convention (Franklin Mint Brief at 28); (ii) that SDRs must be rejected because they are valued upon the basis of a weighted average of five currencies (Franklin Mint Brief at 30); (iii) that the use of SDRs would result in a "judicial intrusion" into the sphere of the political branches (Franklin Mint Brief at 31); and (iv) that SDRs are subject to fluctuations in value (Franklin Mint Brief at 31-32). Each of Franklin Mint's contentions will be considered briefly.

Franklin Mint's contention that the use of SDRs is barred by the language of the Convention ignores the rule that in effec-

10 This tariff is similar to the Montreal Agreement in that it relates only to death or personal injury and voluntarily sets a limit which is higher than that contained in the Convention. It leaves unaffected British Caledonian's liability for cargo, which continues to be approximately $20 per kilogram.

tuating the drafters' intent, the courts must not permit a treaty's language to become a "verbal prison." A change in circumstances may not be permitted to defeat a treaty's original purpose, even if this requires a departure from the letter of the treaty provision in question. *See Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). (*See also* TWA Main Brief at 34-35).

Equally superficial is Franklin Mint's contention that SDRs must fail because they are "nothing more than the weighted average of five currencies" (Franklin Mint Brief at 30). Irrespective of how they are valued, SDRs are the modern-day international unit of account. They are frequently referred to as "paper gold" and to a large extent have taken the place of gold in the international economic system (*see* TWA Main Brief at 30-31). In addition, since the subsequent conduct of the signatories may be considered for purposes of construing the Convention (*see, e.g., Day v. Trans World Airlines, Inc.*, 528 F.2d at 36 n.15), SDRs are particularly appropriate for use as the Warsaw conversion factor; the signatories have recently selected them as the unit of conversion in the Montreal Protocols.

Franklin Mint's "judicial intrusion" argument is also flawed. By adopting SDRs as the unit of account for the Warsaw gold provisions, the Court would not be adopting the Montreal Protocols, which contain a variety of provisions, but merely the unit of account which those Protocols also happen to employ. The Supreme Court of the Netherlands, albeit in the context of the Brussels Convention, has already effectively so held. (TWA Main Brief at 32-35). Moreover, adoption of SDRs would be in accord with Article 18 of the Vienna Convention on the Law of Treaties (*opened for signature* May 23, 1969, *reprinted in* 8 I.L.M. 679, 686 (1969)). Under that Article, the United States' signing of the Montreal Protocols places it under an obligation to avoid undermining them during the ratification process. (*See* TWA Main Brief at 30 n.37).

Franklin Mint's final criticism of SDRs is that they are subject to fluctuations. Significantly, however, SDRs fluctuate in value far less than the market price of gold; to the extent that they do fluctuate, those fluctuations are far closer in nature to the fluctuations which have taken place in the official price of gold, to which Franklin Mint refers, than to the wide and unpredictable fluctuations in the free market price of gold. (JA22-25).

In view of the worldwide trend toward the adoption of SDRs as the Warsaw conversion factor, TWA submits that they are certainly an appropriate alternative unit of account.

POINT IV

IN THE EVENT THAT THE WARSAW LIMITATION PROVISIONS ARE FOUND TO BE UNENFORCEABLE IN THE UNITED STATES, THAT HOLDING SHOULD BE PROSPECTIVE ONLY

As previously demonstrated, the limitation of liability provisions of the Warsaw Convention must be enforced and the most appropriate conversion factor for those provisions is the last official price of gold. However, in the event that the Court disagrees and finds the limitation provisions unenforceable, it is respectfully submitted that such holding must be prospective only. Indeed, the Second Circuit so held in reliance upon *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858 (1982).

There is no doubt as to the controlling law. In *Northern Pipeline* this Court held:

> *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier

> cases, *id.*, at 106, 92 S. Ct., at 355; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, *id.*, at 107, 92 S. Ct., at 355; and third, whether retroactive application "could produce substantial inequitable results" in individual cases, *ibid.* (102 S. Ct. at 2880).

As to the first factor, there is absolutely no doubt that the holding in question is one of first impression whose resolution was not *clearly* foreshadowed. The only existing CAB regulation, which the airlines were legally bound to follow, clearly provided for the continuation of the Warsaw limits with the last official price of gold as the conversion factor (*see supra* p. 14). Moreover, under Article 18 of the Vienna Convention the airlines were entitled to expect that the United States would maintain the status quo until appropriate international action was taken (*see supra* p. 16).

With respect to the second *Chevron* criterion, it is clear that retroactive application would in no way further a holding that the Warsaw limits are unenforceable. On the other hand, it would visit substantial hardship upon numerous airlines which have made financial arrangements in reliance upon an existing CAB regulation which they are required by law to follow.

Finally, with respect to the third *Chevron* criterion, prospective application would not lead to inequitable results in individual cases. Although Franklin Mint asserts that an inequitable result would occur as to it absent retroactive application, because it would obtain less than a full recovery for its alleged loss, its claim is unfounded. At the time that Franklin Mint contracted for the carriage of its goods via TWA, it was well aware of the existing limits and could have easily covered any potential loss through its own insurance. (*See* TWA Main Brief at 3 n.6). Moreover, it would surely be inappropriate to permit air shippers who shipped their goods at a relatively modest cost predicated upon limited liability to collect for loss without limitation. If such a result were permitted to occur, it would be the air carriers, which obviously cannot retroactively raise their rates for goods already shipped, which would suffer a severe inequity.

CONCLUSION

The Judgment of the United States Court of Appeals for the Second Circuit should be modified insofar as it states that the limitation of liability provisions of the Warsaw Convention are prospectively unenforceable; the last official price of gold or, in the alternative, SDRs should be designated as the conversion factor for the Warsaw Convention's limitation of liability provisions.

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